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IN THE

Supreme Court of the United States

OCTOBER TERM, 1927. No. 788.

BURNS MORTGAGE COMPANY, INC.,
Petitioner,

v.

ERWIN M. FRIED,
Respondent.

BRIEF FOR THE RESPONDENT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933. No. 786.

Burns Mortgage Company, Inc.,
Petitioner,

v.

Erwin M. Fried,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR THE RESPONDENT.

OPINIONS BELOW.

Two opinions were delivered by the United States District Court for the Eastern District of Pennsylvania, per District Judge Oliver B. Dickinson. An opinion Sur Statutory Demurrer was filed May 16, 1932 (R. 10-13) and an opinion Sur Motion for Reargument was filed October 10, 1932 (R. 13-15).

The Circuit Court of Appeals for the Third Circuit delivered an opinion written by Circuit Judge

J. Whitaker Thompson, filed on September 19, 1933 (R. 21-25). No opinion was delivered in the denial of a rehearing on November 15, 1933 (R. 26). The decision of the Circuit Court of Appeals is reported in 67 F (2d) 352.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938), as stated in the Petitioner's Brief.

QUESTION PRESENTED.

The question presented is whether the notes (R. 4-7) on which suit was instituted are negotiable instruments so as to entitle Petitioner to sue thereon in its own name and recover thereon free and clear of all defenses existing in favor of Respondent, the maker, against the original payee.

STATUTES INVOLVED.

A. The 34th section of the Judiciary Act (Act of September 24th, 1879 C. 20 sec. 34, 1 Stat. 92; Revised Statutes sec. 721), which provides:

> "* * * the laws of the several states, except where the constitution, treaties, or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at

common law in the courts of the United States, in cases where they apply."

B. The Conformity Act (U. S. C. Title 28, Sec. 724):

> "'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.'"

C. The 1st and 2nd sections of the Uniform Negotiable Instruments Act (adopted in every state jurisdiction and more particularly in Florida by Laws 1897 C. 4524; Comp. Gen. L. 1927, secs. 6760-6929), which provides:

> "Sec. 1. Form of Negotiable Instrument. An instrument to be negotiable must conform to the following requirements:
>
> * * * * * * *
>
> "(2) Must contain an unconditional promise or order to pay a sum certain in money; * * *.
>
> "Sec. 2. Certainty as to Sum; What Constitutes. The sum payable is a sum certain within the meaning of this Act, although it is to be paid:
>
> "(1) With interest; or
>
> "(2) By stated installments; or
>
> "(3) By stated installments, with a provision that upon default in payment of any installment or of interest, the whole shall become due; * * *."

RESPONDENT'S STATEMENT OF CASE.

Petitioner brought suit in the United States District Court on six promissory notes given by Respondent in 1925 to Golden Isles Corporation for a consideration to be furnished by said Golden Isles Corporation. The consideration was never furnished. Petitioner, claiming to be the transferee, after maturity, of a holder in due course, sued on said notes in Petitioner's own name.

Each of the notes contains the following provision:

> "* * * with interest thereon (the principal sum) at the rate of 7 per cent per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent per annum, payable semi-annually."

The Respondent interposed an Affidavit of Defense raising questions of law in which he averred that the suit was improperly brought in the name of the Petitioner for the reasons, among others: (1) that the Petitioner could not sue in its own name since the notes were transferred to it after maturity; and (2) that the notes were non-negotiable, that the Petitioner who claimed title through the endorsement by the payee, was merely an assignee, and that, therefore, under Pennsylvania procedure the Petitioner could not sue in its own name, but only in the name of the assignor to its use.

The District Court, Dickinson, *J.*, reached the conclusion that under the procedural law of Pennsyl-

vania there was in the Petitioner no right of action and accordingly ruled that:

(1) The obligations sued upon were not negotiable instruments under Pennsylvania law.

(2) The Statement of Claim disclosed no legal right of action in the Petitioner.

The Petitioner moved for a re-argument, which, after rehearing, was denied, and the District Court entered a judgment of *non pros* in favor of the Respondent, the Petitioner having declined to avail itself of the opportunity given it to amend by suing in the name of the payee to its use.

In an opinion by Thompson, *C. J.*, the Circuit Court of Appeals affirmed the judgment of the District Court, following the rule established in Swift *v.* Tyson, 16 Pet. 1, and applying general principles and doctrines of commercial jurisprudence (R. 23). In applying said principles and doctrines, the Circuit Court held the notes in question non-negotiable because of the uncertainty as to the amount due thereon (R. 24).

A petition for rehearing was denied by the Circuit Court of Appeals (R. 26).

SUMMARY OF ARGUMENT.

The Circuit Court was correct in holding the notes in suit non-negotiable because of the uncertainty as to the amount due thereon.

Under the rule enunciated in Swift *v.* Tyson, 16 Pet. 1, the Circuit Court of Appeals was compelled to determine the question of negotiability according to the general commercial law and, under that general commercial law, the notes are non-negotiable.

If the law of any particular state was conclusive upon the Court, it was the law of Pennsylvania, inasmuch as a procedural point was involved and, on questions of procedure, the law of the forum, *i. e.* Pennsylvania, governs. The notes in question are non-negotiable under Pennsylvania law, consequently the Court would be compelled to reach the same result had Pennsylvania law been applied.

Even under Florida law, assuming that the law of that state should control, there has been no adjudication that notes with provisions identical to those here involved are negotiable instruments under the Uniform Negotiable Instrument Law.

In refusing to consider itself limited to the Florida law governing the construction of negotiable instruments, the Circuit Court did not refuse to give "full faith and credit" to the public acts and judicial proceedings of that state so as to violate Article IV of the Constitution.

The Circuit Court correctly applied the general commercial law in deciding that the notes were non-negotiable because the particular interest provision of said notes made the amount due thereon uncertain.

The decision of the Circuit Court of Appeals should, therefore, be affirmed.

ARGUMENT.

1. THE DECISION OF THE CIRCUIT COURT OF APPEALS IS A LOGICAL APPLICATION OF THE RULE OF SWIFT v. TYSON, AND IS IN ACCORD WITH MANY APPLICATIONS OF THAT RULE BY THIS COURT.

In the celebrated case of *Swift* v. *Tyson*, 16 Pet. (U. S.) 1, 10 L. Ed. 865 (1842), the Supreme Court was called upon to decide whether, in determining the status of a holder of negotiable paper, it was bound to follow the law of the state of New York to the effect that a pre-existing debt was not sufficient consideration to make the one taking such an instrument a bona fide holder. This Court, per Story, *J.*, held that it was not bound to apply the law of the state of New York, where the bill of exchange was accepted, but was obliged to determine whether sufficient consideration existed according to the general principles of commercial law. In so deciding, this Court, in discussing Section 34 of the Judiciary Act of 1879, ch. 20, stated at page 18:

> "It never has been supposed by us, that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon *local* statutes or *local* usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to

perform the like functions as ourselves, that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of commercial law to govern the case. And we have not now the slightest difficulty in holding, that this section, upon its true intendment and construction, is *strictly limited to local statutes and local usages of the character before stated,* and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly, the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. *The law respecting negotiable instruments may be truly declared in the language of Cicero, adopted by Lord Mansfield in Luke* v. *Lyde, 2 Burr. R. 883, 887, to be in a great measure, not the law of a single country only, but of the commercial world."* (Italics ours.)

The doctrine of Swift *v.* Tyson has been recognized and applied by the Supreme Court for almost one hundred years and in a wide variety of situations. In *Carpenter* v. *Providence Washington Insurance Company,* 16 Pet. 495, 10 L. Ed. 1044 (1842), it held

that the construction of an insurance policy involved a question of general commercial law, and in *Lane* v. *Vick*, 3 How. 464, 11 L. Ed. 681 (1845), held likewise in regard to the construction of a will. In each case, the Supreme Court disregarded state decisions to make its own interpretation of the proper principles of common law applicable to the situation presented.

In *City of Chicago* v. *Robbins*, 2 Black 418, 17 L. Ed. 298 (1863), the Court refused to follow the determination of the state court as to what constituted negligence, and in *Yates* v. *Milwaukee*, 10 Wall. 497, 19 L. Ed. 984 (1871), the Court held the determination of what constituted a dedication of land to public use to be a question of general law. In *Olcott* v. *Fond du Lac County*, 16 Wall. 678, 21 L. Ed. 382 (1873), it was held that the determination of what is a public purpose to warrant municipal taxation involved a question of general law, in regard to which the state decisions need not be followed.

In *Liverpool and G. W. Steamboat Co.* v. *Phenix Insurance Co.*, 129 U. S. 397, 32 L. Ed. 788 (1889), a question concerning the validity of a contract for carriage of goods was held one of general law, and in *Baltimore & Ohio Railroad Co.* v. *Baugh*, 149 U. S. 368, 37 L. Ed. 772 (1893), the responsibility of a railroad company to its employees for personal injuries was likewise held a question of general law.

In *Salem Trust Co.* v. *Manufacturers Finance Co.*, 264 U. S. 182, 68 L. Ed. 628 (1923), there was involved a question of priority between two assignees of a debt where the latter assignee had given a prior notice to the debtor. It was declared that the question was one of general law and, therefore, that the decisions of the courts of the state where the transaction arose were not binding on the Federal Courts. An independent judgment was accordingly exercised in line with the rule of Swift *v.* Tyson.

In a comparatively recent decision, *Black & White Taxicab and Transfer Co.* v. *Brown & Yellow Taxicab and Transfer Co.*, 276 U. S. 518, 72 L. Ed. 681 (1928) the doctrine of Swift *v.* Tyson was again reaffirmed and it was held that the question whether or not the granting by a railroad company of exclusive privileges at its station to one transfer company is invalid as against public policy, is one of general law upon which the Federal Courts are not bound by state decisions.

In view of the foregoing array of decisions, it cannot be doubted that the rule of Swift *v.* Tyson is still a live doctrine to be applied by the Federal Courts.

The construction of negotiable instruments has always been considered by the Federal Courts as a question of general commercial law on which they are not bound by state decisions. The very case in which the rule was enunciated, Swift *v.* Tyson, *supra,* involved the decision by the Court as to whether the

holder of negotiable paper was a bona fide holder in view of the circumstances under which the holder acquired the instrument. The Court, as indicated above, refused to apply the law of the State of New York, saying that it would decide the question according to its construction of the general principles of commercial law and, applying these principles, the Court decided that the plaintiff was a bona fide holder and permitted recovery. In numerous cases since the pronouncement in Swift *v.* Tyson, *supra,* this Court has had occasion to apply general principles of commerical law to negotiable instrument questions in disregard of the law of particular states, as will be seen from the following cases:

1. WATSON v. TARPLEY, 18 How. 517, 15 L. Ed. 509 (1856).

In an action by an indorsee against the drawer of a bill of exchange, it appeared that the drawee had not accepted the bill, whereupon the bill was protested and notice of such fact given to the drawer. One defense suggested was that a *statute* of the state of Mississippi forbade action unless notice of non-presentment and non-payment at maturity were given. This Court, following Swift *v.* Tyson, in ruling out this defense, held that the question was one of general commercial law, which the Mississippi statute and the construction given to it by the Mississippi courts could not control in the Federal Courts. As a preface to its approval of the rule of Swift *v.* Tyson, this Court stated, at page 520:

> "Whilst it will not be denied that the laws of the several States are of binding authority upon their domestic tribunals, and upon persons and property within their appropriate jurisdiction, it is equally clear that those laws cannot affect, either by enlargement or diminution, the jurisdiction of the courts of the United States as vested and prescribed by the Constitution and laws of the United States, nor destroy or control the rights of parties litigant to whom the right of resort to these courts has been secured by the laws and Constitution. This is a position which has been frequently affirmed by this court, and would seem to compel the general assent upon its simple enunciation."

2. GOODMAN v. SIMONDS, 61 U. S. 343, 15 L. Ed. 934 (1858).

In sustaining a litigant's position as a holder in due course, where one contention was that the holder took the instrument as collateral security for a pre-existing debt, this Court affirmed Swift *v.* Tyson, as an exposition of general commercial law on the question there under consideration, saying, at p. 364:

> "Mercantile law is a system of jurisprudence acknowledged by all commercial nations; and upon no subject is it of more importance that there should be, as far as practicable, uniformity of decision throughout the world. A well defined and correct exposition of the rights of a bona fide holder of a negotiable instrument was given by this court in Swift *v.* Tyson, 16 Pet. p. 1, as long ago as 1842; and we adopt that exposition

relative to the point under consideration on the present occasion; as one accurately defining the nature and character of the title to those instruments which such holder acquired when they are transferred to him for a valuable consideration."

3. BOYCE v. TABB, 18 Wall 546, 21 L. Ed. 757 (1873).

Shortly after the Thirteenth Amendment to the Constitution had been adopted, the Louisiana courts held, on the ground of public policy, that they would not enforce contracts for the purchase and sale of slaves, even though the contracts sued on were valid when made, *i. e.*, when entered into prior to the adoption of the Thirteenth Amendment. In an action on a promissory note given in Louisiana in connection with the purchase of slaves prior to the adoption of the Amendment the defense was raised that the Federal courts were bound under Section 34 of the Judiciary Act to follow the Louisiana decisions. The Court, however, allowed recovery on the note, saying that the question was one of general commercial law, upon which it, as a Federal court, could exercise an independent judgment, saying that Section 34 of the Judiciary Act was not intended to apply to "questions of a general nature not based on a local statute or usage, nor on any rule of law affecting titles to land, nor on any principle which had become a settled rule of property."

4. OATES v. FIRST NATIONAL BANK OF MONTGOMERY, 100 U. S. 239; 25 L. Ed. 580 (1879).

In an action on a negotiable instrument, it was contended that under Alabama Law one who received a promissory note as collateral security for a pre-existing debt did not become a purchaser for value in the course of business. In holding that the one taking the instrument under such circumstances became a purchaser for value, the court brushed aside the argument as to the applicability of the Alabama law with the following statement (p. 246):

> "While the Federal Court must regard the laws of the several States, and their construction by the state courts (except when the Constitution, treaties or statutes of the United States otherwise provide) as rules of decision in trials at common law in the courts of the United States, in cases where applicable, they are not bound by the decisions of those courts upon questions of general commercial law. Such is the established doctrine of this court, so frequently announced that we need only refer to a few of the leading cases bearing upon the subject. Swift *v.* Tyson, 16 Pet., 1; Carpenter *v.* Ins. Co., 16 Pet., 495; Watson *v.* Tarpley, 18 How. 517, 15 L. Ed., 509. We have already seen that the *statutes of Alabama placed under the protection of the commercial law promissory notes*, payable in money at a certain designated place; but how far the rights of parties here are affected by the rules and doctrines of that law is for the Federal Courts to determine upon their own judgment as to what these rules and doctrines are.

"Upon principle and authority, we do not doubt that the defendant in error was, in the sense of the commercial law, a bona fide holder for value of the note in suit." (Italics ours.)

5. BROOKLYN CITY & NEWTOWN R. R. CO. v. NATIONAL BANK OF REPUBLIC OF NEW YORK, 102 U. S. 14; 26 L. Ed. 61 (1880).

In this case, a question involving the rights of a holder of a negotiable instrument was again considered by this court as one of general commercial law to be decided by general principles of commercial law rather than the law of a particular state. As to the nature of this commercial law, the following statement of Clifford, *J.*, at page 55, is interesting:

"Commercial law, says Bouvier, is a phrase employed to denote the branch of the law which relates to the rights of property and the relations of persons engaged in commerce. Persons engaged in commercial adventures, wherever they may have their domicil, have business relations throughout the civilized world, from which it results that commercial law is less local and more international than any other system of law, except the law of nations.

"Codes, laws and ordinances of other States, says a learned writer, whether ancient or modern, are received by the courts with great respect, not as containing any authority in themselves, but as evidence of the general law merchant. Where these are contradicted by judicial decisions, they cease to have any value in the jurisdiction where

the law is decided to be the other way. Levi, 2d. ed., 2.

"Authoritative support to the proposition, that the decisions of the State Courts do not control in such a case, is also derived from other decisions of this court, in which every member of the court concurred. Carpenter *v.* Ins. Co., 16 Pet., 495, 511."

A review of the above cases indicates clearly that questions involving negotiable instruments are within the special purview of Swift *v.* Tyson, *supra.* The law of negotiable instruments, developed to meet the needs of those engaged in commercial transactions throughout the world, is the very sort of situation the Court, in Swift *v.* Tyson, must have had in mind. In no other field is it as desirable to have real uniformity and that real uniformity, it is submitted, can only be accomplished by applying the ruling of Swift *v.* Tyson to questions involving the construction of negotiable instruments.

The Petitioner contends that the fact that Florida has passed a statute on the subject deprives Swift *v.* Tyson of its applicability to the instant case. But, it should be noted, Story, *J.*, at p. 19, in his opinion in that famous case, indicates the contrary, when he states:

"And we have not now the slightest difficulty in holding, that this section, (Section 34 of the Judiciary Act) upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, *and*

does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence." (Italics ours.)

Can the Uniform Negotiable Instrument Law passed by Florida be considered a local statute within the meaning of the above decision to warrant a disregard of the rule of Swift *v.* Tyson? It is respectfully submitted that it cannot be so considered.

In numerous cases heretofore, even though State statutes were involved, this Court has declined to consider itself bound by the interpretation of these statutes where they have had to do with mercantile or general commercial law, this Court reasserting the doctrine of Swift *v.* Tyson that it must decide those questions after an independent investigation and an application of what it conceives to be sound principles of commercial law. The following cases seem to be especially in point:

1. BOARD OF SUPERVISORS OF MARSHALL COUNTY v. SCHENCK, 72 U. S. 772, 18 L. Ed. 556 (1867).

In this case bonds were issued by a county in Illinois and appeared on their face to be duly issued. As a matter of fact, an Illinois statute required that the order for the election to secure the voters' consent to the bond issue be issued by supervisors of the county rather than by the county court. This provision of the statute was not observed in the issuance

of the bonds. The Illinois Supreme Court had held that such bonds were void, even in the hands of an innocent holder. This Court, however, held that this was a question of commercial law on which the Federal court would not be bound by the State decisions and, therefore, held that the bonds were good in the hands of a bona fide holder.

2. TOWN OF PAÑA v. BOWLER, 107 U. S. 529, 27 L. Ed. 424 (1883).

In this case bonds were issued by a town in Illinois to raise funds for donation to a railroad company. An Illinois statute prescribed certain formalities for the election to determine whether the bonds should be issued. The formalities were not complied with. The Illinois Supreme Court held that a bona fide holder of the bonds could not recover from the town in view of the irregular circumstances attending their issuance. In the Federal courts, however, the bona fide holders were permitted to recover, this Court indicating that the Federal courts were not bound by the State decision inasmuch as the matter was one of general commercial law.

3. BURGESS v. SELIGMAN, 107 U. S. 20, 27 L. Ed. 359 (1883).

A Missouri statute made stockholders of a corporation liable for unpaid debts at the time of dissolution. Seligman & Co. held stock of the corporation as collateral security and, under the terms of the Missouri statute, claimed an exemption as such pledgee from

personal liability. The Missouri Supreme Court, however, had held that the exemption privilege did not extend to Seligman & Co. as the exemption provision of the statute did not extend to persons receiving such stock as collateral security from the corporation itself. When the same question was presented to this court, it was held that the State decisions were inapplicable and that Seligman & Co. were entitled to be released from liability. The State decisions were thus disregarded.

4. TOWN OF ENFIELD v. JORDAN, 119 U. S. 680, 30 L. Ed. 523, (1887).

In another case involving the issuance of bonds by a town, the State Supreme Court had held that a municipal corporation could not make its bonds payable elsewhere than at the office of the town treasurer. The Federal Court, however, refused to consider itself bound by the State decision, indicating that it was a question of general commercial law on which an independent judgment would be exercised.

5. PRESIDIO COUNTY v. NOEL-YOUNG BOND AND STOCK Co., 212 U. S. 58, 53 L. Ed. 402 (1909).

In this case, county bonds were illegally issued by county commissioners, although there was nothing on the face of the bond which indicated that the statutes governing the issuance of bonds had not been complied with. The Supreme Court of Texas had held that persons purchasing these bonds were put upon inquiry as to the circumstances under which they

were issued and could therefore not recover in view of the original failure to comply with the law. In the Federal court it was held that a person taking such bonds without knowledge of the circumstances of issuance was a bona fide owner. This Court held that the Federal courts were not bound by the Texas decisions.

In each of the foregoing cases, the particular state had legislated concerning the subject matter under consideration. The fact, however, that a statute had been passed did not, of itself, remove the subject matter from the field of the mercantile or commercial law concerning which the Federal Courts, since Swift *v.* Tyson, *supra,* have been obliged to exercise their independent judgment and apply their own construction of the general commercial law.

The lower Federal Courts have frequently taken the position that they are not bound by state decisions construing statutes which are merely declaratory of the common law.

In *Cudahy Packing Co.* v. *State National Bank of St. Louis,* 134 Fed. 538 (1904), the Circuit Court of Appeals for the Eighth Circuit declared an instrument negotiable, despite the fact that under the statutes and decisions of Missouri, in which state the instrument originated, it would have been held non-negotiable. The Circuit Court, relying on Swift *v.* Tyson, found no difficulty in declaring a question involving negotiable instruments one of general commercial law, which should be determined by broad

commercial principles rather than local interpretation. The same Circuit Court has re-asserted this position in *Guernsey* v. *Imperial Bank of Canada,* 188 Fed. 300 (1911), and *Smith* v. *Nelson Land & Cattle Co.,* 212 Fed. 56 (1914).

In *Peterson* v. *Metropolitan Life Ins. Co.,* 19 F. (2d) 74 (1926), affirmed in 19 F. (2d) 88 (1927), the Federal Court had occasion to pass upon the applicability of a provision of Iowa's Negotiable Instruments Law and decided that, inasmuch as it was merely a re-enactment of well-settled principles of commercial law, the Federal Court would be bound only by decisions of a superior federal court construing said provision. Swift *v.* Tyson, Watson *v.* Tarpley, Brooklyn City and Newtown Railroad Co. *v.* National Bank of the Republic of New York, all *supra,* were quoted with approval.

In *Mutual Life Ins. Co.* v. *Lane,* 151 Fed. 276 (1907), affirmed in 157 Fed. 1002, certiorari denied 208 U. S. 617, the Federal Circuit Court, for the Eastern District of Georgia, ruled that it was not bound by the decision of the highest appellate court in Georgia construing a Georgia statute dealing with contracts of insurance, on the ground that the statute was merely declaratory of a general principle of commercial law.

In *Capital City State Bank* v. *Swift,* 290 Fed. 505 (1923), a Federal Court held the same provision of the Negotiable Instruments Act now under consideration merely declaratory of the common law and, inasmuch as a question of general commercial law was involved,

refused to follow the construction of such statute by the Supreme Court of Oklahoma.

Similarly, in *Jockmus* v. *Claussen & Knight, Inc.*, 47 F. (2d) 766 (1930), a Federal Court indicated that the interpretation of the Florida Negotiable Instruments Act by the Florida Supreme Court would not be binding on the Federal Courts, the question under consideration being one of general commercial law.

It is respectfully submitted that the passage of the Uniform Negotiable Instrument Act by a state should not have the effect of abrogating the rule of Swift *v.* Tyson but, on the contrary, furnishes an additional reason for adherence to that rule.

If there is any field in which uniformity is particularly desirable it is in the construction of negotiable instruments. Having in mind the fact that such instruments passed freely in commercial transactions and were to be widely distributed, it is not surprising that this Court sought to accomplish real uniformity by considering negotiable instrument questions matters of general commercial law rather than local matters as to which state laws would control. Obviously, this Court, in deciding Swift *v.* Tyson, knew that it was establishing a precedent for Federal Courts sitting in New York different from the rule which would be applied by the state courts in New York faced with the same question. It found no difficulty in ruling that two courts sitting in the same locality should apply different principles. In seeking

to apply what it conceived to be the general commercial law, it was making a definite step towards uniformity and seeking to localize the effect of a decision which it believed to be out of harmony with the principles of general commercial law. The fact that Swift v. Tyson has been repeatedly affirmed and followed indicates that this Court has been consistent in its efforts to accomplish real uniformity so far as matters of general commercial law are concerned.

The Uniform Negotiable Instruments Law was urged upon and adopted by the states with the same idea of uniformity in mind. It was not intended to supplant or to change principles of commercial law as they were recognized throughout the commercial world, but to re-enact or codify the settled and established principles familiar to those engaged in commercial enterprises. As stated by the court in *Taylor* v. *American National Bank*, 63 Fla. 631, 649, the case urged upon this Court by Petitioner as controlling,

> "It should be borne in mind that the 'Negotiable Instrument Law,' which has been adopted by a majority of the states, including Florida, is primarily a codification of the rules of the law merchant.' It has also been termed 'in substance a codification of the principles of the common law governing negotiable instruments.' See Section 1 of Selover's Negotiable Instrument Law, 2nd ed."

Since the passage of the Uniform Negotiable Instruments Law by the various states with the definite

aim of accomplishing uniformity in regard to the form and effect of negotiable instruments, it is even more important that the doctrine of Swift *v.* Tyson be followed than it was formerly. Real uniformity can only be accomplished if the Federal courts still continue to determine questions involving the construction of negotiable instruments by an independent investigation and an application of what they conceive to be general principles of commercial law. To limit them to the decisions of one state is to lessen the possibility of the complete national uniformity sought by the Uniform Negotiable Instruments Act. It is submitted that a disregard of the rule of Swift *v.* Tyson in the instant case would be fatal to the accomplishment of such uniformity. It would make impossible the localization of an erroneous or poorly reasoned state interpretation. Instead, if all Federal courts are to be bound by the decision of the State court the injurious effect of an unsound state decision is injected into the federal system, the decision of the state court thus being given an effect far beyond its deserts and considerably beyond the intent of the framers of the Constitution as that intent was interpreted by the decision in Swift *v.* Tyson.

If the state interpretation is sound and well reasoned, it will be given consideration by the Federal courts in its determination of the general commercial law, as has always been the case, but the Federal courts must not be concluded thereby, if they are to perform the functions allocated to them by the

Constitution and the Acts of Congress passed thereunder.

An equally cogent reason for following the rule of Swift *v.* Tyson in the instant case is that a disregard of that rule would be a direct interference with the judicial system established by the Federal Constitution. Sec. 1 Art. III, vests judicial power in the Supreme Court and such inferior courts as Congress may establish, and Sec. II of Art. III provides that the judicial power shall extend to all cases in law and equity arising under the Constitution, the same section extending the judicial power to include controversies between citizens of different states, such as the controversy existing in the instant case. As interpreted in Swift *v.* Tyson, the Constitution by these provisions gave to litigants privileged to use the Federal courts the right to have questions of general commercial law determined by the Federal court after an independent investigation of the principles of commercial law applicable to the situation. To approve the position of Petitioner would be to declare that in one large field of commercial law, namely the construction of negotiable instruments, the Federal courts are prevented from exercising an independent judgment, and, provided the state courts have interpreted the general commercial law as codified in their Negotiable Instruments Act, must merely re-echo the position of the state court, however ill advised or unsound the position of the state court might be, or however far

removed from general principles of commercial law that decision might be. It is respectfully submitted that, in such event, the right of a plaintiff to sue in the Federal courts by reason of diversity of citizenship is worthless in cases involving negotiable instruments, further, that the Federal courts will have surrendered to the State Courts a portion of the jurisdiction granted to them under the Constitution, and laws enacted by Congress, a jurisdiction which has been repeatedly recognized ever since this Court's decision in Swift *v.* Tyson in 1842.

It is further submitted that one particular weakness of Petitioner's position lies in the fact that it presupposes a definite fixity of interpretation by the state courts. But state courts have been known to reverse their position in the interpretation of statutes. An examination of the situation in *Gelpcke* v. *Dubuque,* 1 Wall. 175, 17 L. Ed. 520 (1864), is helpful in this regard. There, the City of Dubuque had issued certain bonds to purchase stock in a railroad company. In an action by bona fide holders of these bonds the defense was set up that the legislature of Iowa had no authority under the Iowa constitution and statutes to authorize municipal corporations to issue bonds in payment for stock in railroad companies. It appeared that the Supreme Court of Iowa had, in several decisions, held that bonds issued for this purpose by municipalities were valid. At the time the case was presented to the Federal court, however, a recent decision

of the Supreme Court of Iowa had overruled the earlier decisions and declared that, under the constitution and statutes of Iowa, the bond issue was invalid and that even bona fide holders of the bonds could not recover. The argument was advanced that the Federal courts were bound by the later interpretation of the constitution and statutes by the highest court of the state. The United States Supreme Court, however, declared that the bona fide holders could recover, and disregarded the later pronouncement of the Iowa Supreme Court. The Court, in its opinion, indicated that it disagreed with the latest decision of the Iowa Supreme Court, pointing out that it, with a few other decisions, stood alone, and that the earlier decisions were sustained by reason and authority.

The question presented to the court in *Gelpcke* v. *Dubuque* was one of general commercial law, namely the right of a holder of a negotiable bond to recover from the obligor, despite an irregularity in its issuance not apparent from the face of the obligation. It is respectfully submitted that the interpretation by a Florida court of the Florida statute now under consideration is no more binding on the Federal courts than was the interpretation by the Iowa court of the statute under which the bonds were issued in *Gelpcke* v. *Dubuque, supra.*

The practical difficulty with Petitioner's position is apparent here. If Petitioner's contention is correct, it makes the Federal court a vacillating body, shifting and changing its position on questions of com-

mercial law as the state court changes its position. A ruling which would have this effect, it is submitted, is hardly consistent with the dignity of the Federal courts and decidedly at variance with the intent of the framers of the Constitution.

2. ASSUMING THAT THE CIRCUIT COURT ERRED IN APPLYING GENERAL COMMERCIAL LAW, SUCH ERROR WAS HARMLESS, AS IT WOULD BE COMPELLED TO APPLY PENNSYLVANIA LAW, THE LAW OF THE FORUM, TO THE PROCEDURAL QUESTION INVOLVED AND THE PENNSYLVANIA LAW ACCORDS WITH THAT FOUND BY THE COURT TO BE GENERAL COMMERCIAL LAW.

If the Circuit Court erred in applying general commercial law under the rule of Swift *v.* Tyson, the error was harmless, inasmuch as it would have been compelled to apply Pennsylvania law, the question involved being one of procedure, and the Pennsylvania law is in accord with that declared by the Circuit Court as the general commercial law.

It is settled law in the Federal Courts that the law of the forum governs as to all questions of practice and procedure. The District Court, in the first instance, had before it the question whether the holder of the instrument had a right to sue in his own name, the determination of which question necessarily involved a decision as to the negotiability of the note on which suit was brought. As stated by the Circuit Court in its opinion (R. p. 22):

> "The ultimate question for decision on appeal is a procedural one: whether the Burns Mortgage Company, Inc. was entitled to bring suit in its own name as plaintiff."

Also, in its opinion, it was stated by the Circuit Court (R. p. 24):

> "In view of our discussion concerning the negotiability of the notes in suit, we do not deem it necessary to do more than indicate that the Conformity Statute (28 U. S. C. A. 724) requires that in all procedural matters we apply the law of the state within which the District Court is held."

The Conformity Act referred to in the above quoted excerpt from the opinion of the Circuit Court provides:

> "'The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceedings existing at the time in like causes in the courts of record of the State within which such district courts are held, any rule of court to the contrary notwithstanding.'"

Under the Conformity Act it has been definitely established that in civil actions instituted in the Federal Court, questions of practice and procedure are to be regulated by the law of the state within which the District Court is held. A question as to

the person in whose name suit should be brought in the District Court is a question of practice or procedure within the meaning of the Conformity Act. *New York Evening Post* v. *Chaloner* (C. C. A., N. Y.) 265 Fed. 204, 211 (1920); writ of certiorari dismissed, 252 U. S. 591 (1920).

There is also additional authority for the proposition that, in a situation similar to the one involved in the instant case, the law of the forum rather than the law of the place of contract governs the negotiability of a written instrument.

Roads *v.* Webb, 91 Me. 406 (1891);
Roosa *v.* Crist, 17 Ill. 450 (1855);
Hakes *v.* Terra Haute N. Bk., 164 Ill. 273 (1896);
McRae *v.* Mattoon, 10 Pick. (Mass.) 53 (1830);
First Nat'l Bank of Miami *v.* Bosler, 297 Pa. 353 (1929).

The following succinct statement by the Court in Roads *v.* Webb, *supra,* at p. 412, is illustrative of the principle followed in the cases cited above.

> "But the *lex fori* governs as to all matters pertaining to the remedy. That law governs as to the negotiability of the contract, because upon it depends the question who has a right of action."

The same proposition is again set forth as a well settled principle of law in 8 C. J. 94 in the following language:

> "In so far as the question of the negotiability of an instrument determines the right of a transferee to sue thereon, the law of the forum governs, to determine whether the transferee can sue in his own name. In other words, the law of the forum, rather than the law of the place of contract, governs the negotiability of a note so far as the question of who may sue depends on negotiability."

In view of the decision of the Pennsylvania Supreme Court in *First National Bank of Miami* v. *Bosler, supra* (referred to at length *infra*), it is submitted that an application of Pennsylvania law would necessitate a ruling in accord with that of the Circuit Court; namely, that the notes in question are non-negotiable because uncertain as to the amount due thereon.

3. THE LAW OF FLORIDA HAS NOT DEFINITELY DETERMINED THAT A NOTE CONTAINING THE IDENTICAL PROVISIONS APPEARING IN THE NOTES IN SUIT IS NEGOTIABLE UNDER THE FLORIDA NEGOTIABLE INSTRUMENTS LAW.

The Florida Supreme Court has not determined whether an instrument such as the one now under consideration is negotiable under its Negotiable Instruments Law, consequently there is no authoritative interpretation for the Federal Courts to follow, assuming that the doctrine of Swift *v.* Tyson is to be

disregarded. In *Taylor* v. *American National Bank*, 63 Fla. 631, 57 So. 678 (1912), the case urged upon the Court by Petitioner as controlling, there was no provision for interest on deferred interest payments "from maturity" such as is involved in the instant case and which, it is contended by Respondent, makes the instruments involved in the instant case non-negotiable.

4. THE CIRCUIT COURT, IN REFUSING TO BE BOUND BY THE FLORIDA STATUTE AND ITS INTERPRETATION, DID NOT VIOLATE THE FULL FAITH AND CREDIT CLAUSE OF THE CONSTITUTION.

The Circuit Court, in deciding as it did, in no way violated Article IV, Section 1, of the Constitution by refusing to give full faith and credit to the Florida statute and decisions interpreting that statute. The full faith and credit clause is not applicable to the situation before this Court, inasmuch as there is no question raised as to the validity of the Florida statute. It is admitted that the Act was properly adopted and that, as to all situations to which it applies under the Constitution and laws of the United States and several states, it is effective. Assuming however, that the notes considered in *Taylor* v. *American Bank*, 63 Fla. 631, 57 So. 678 (1912), were identical with the notes now under consideration (which is not the case), the Circuit Court, by its decision, disagrees with the interpretation placed upon

the Florida statute by the Florida Court; in effect, it says that proper principles of commercial law would dictate an exactly opposite ruling and, inasmuch as the Circuit Court is bound, under *Swift* v. *Tyson*, and kindred cases, to apply principles of general commercial law, it must rule the instrument under consideration non-negotiable regardless of what the Florida Supreme Court would do if passing upon a similar instrument.

The construction most favorable to Petitioner that can be placed upon the action of the Circuit Court is that it has interpreted the Florida statute, or rather, the general commercial law as expressed in the Florida statute, differently from the Florida Court. It is, however, well settled that where the validity of a state statute is not in question, and the controversy turns merely upon its interpretation or construction, no question arises under the "full faith and credit" clause of the Federal Constitution. *Western L. Ind. Co.* v. *Rupp*, 235 U. S. 261; 59 L. Ed. 220 (1914).

It is respectfully submitted that Petitioner loses sight of the nature of the full faith and credit clause. That clause, and the acts of Congress under it, establish a rule of evidence rather than one of jurisdiction. As stated by Mr. Justice Story in his Commentary on the Conflict of Laws, Sec. 609:

> "The Constitution did not mean to confer any new power upon the states, but simply to regulate the effect of the acknowledged jurisdiction over persons and things within their territory."

See also Vol. 1, Willoughby, *The Constitution of the United States*, Sec. 148; *Thompson* v. *Whitman*, 18 Wall. 457; 21 L. Ed. 897 (1874).

The full faith and credit clause must be read in the light of the other provisions of the Constitution and laws thereunder, particularly Article III dealing with the Judicial Power, Section 34 of the Judiciary Act (R. S. 721) and the numerous cases construing said Act, noticeably *Swift v. Tyson, supra.*

5. UNDER GENERAL COMMERCIAL LAW, THE NOTES IN QUESTION ARE RENDERED NON-NEGOTIABLE BECAUSE OF UNCERTAINTY AS TO THE AMOUNT DUE THEREON.

According to the law merchant and the modern general commercial law founded upon the principles established by the law merchant, an instrument to be negotiable was obliged to conform to certain requirements, one of which was that it must contain an unconditional promise or order to pay a sum certain in money. The various states, in adopting the Uniform Negotiable Instruments Act, containing this requirement, were establishing no peculiar local policy, but were merely reasserting a familiar principle of commercial law. In some portions of the Act, the various Legislatures may have sought to engraft new provisions considered by them as improvements upon the old principles, but not so with the requirement of certainty, for in that element lay the instrument's real value. Notes such as those involved in the

present action were to be used in commercial dealings and were to pass freely about as representing a certain amount of value, in other words, were to take the place of money in commercial transactions. To accomplish these objects, it is absolutely essential that the instrument reveal, from the instrument itself, without resort to outside sources, that at any given date, a sum certain was due or would be due. The Circuit Court, in the instant case (R. p. 24) pointed out that if the maker of an instrument is to be held liable in a suit by a holder for whatever sum appears to be payable from the face of the instrument, and barred from defenses available against the original payee, the extent of his liability must appear upon the face of the note; otherwise there is no certainty as to the sum due. The notes in question clearly lack that certainty.

In *First National Bank of Miami* v. *Bosler,* 297 Pa. 353 (1929), the Supreme Court of Pennsylvania, an important commercial jurisdiction, ruled that the commercial law requirement of certainty embodied in the Negotiable Instruments Law of Florida (Fla. Laws 1897, C. 4524; Comp. Gen. L. 1927 Sec. 6760-6929) and Pennsylvania (Act of May 16, 1901, P. L. 194) meant that, if the note contained a provision for interest "it must clearly appear, from the note itself, that at any given date the two (*i. e.,* principal and interest) will always aggregate 'a sum certain.'" It accordingly declared the notes there under consideration non-negotiable as the "sum certain" was

not apparent from the face of the instrument. And in another important commercial jurisdiction, New Jersey, in *New Miami Shores Corporation* v. *Duggan*, 9 N. J. Mis. R. 620, 155 Atl. 262 (1931), affirmed 109 N. J. L. 220, 160 Atl. 619 (1932), the Pennsylvania decision in *First National Bank* v. *Bosler, supra,* was approved and followed. The Circuit Court of Appeals approved the reasoning and conclusions reached in these cases (R. p. 24).

The notes in the instant case (R. pp. 4-7 inc.) are even more uncertain than those involved in the Bosler case. It will be recalled that each note contains the following provision:

> "with interest thereon (the principal sum) at the rate of 7 per cent. per annum from date until fully paid. Interest payable semi-annually. * * * Deferred interest payments to bear interest from maturity at 10 per cent. per annum, payable semi-annually."

It will also be recalled that the notes are all dated August 28, 1925, and are payable February 28, 1926, August 28, 1926, February 28, 1927, August 28, 1927, February 28, 1928, and August 28, 1928, respectively. Taking for purposes of illustration, the note payable August 28, 1928 (R. p. 7), that instrument, if tendered to a person in payment of a debt or in some other mercantile transaction prior to August 28, 1928, would not indicate, with any semblance of accuracy, the "sum certain" it is supposed to represent. It calls for a principal sum of $1000, with interest at 7 per cent. from August 28, 1925, "until fully paid." It

also calls for "interest payable semi-annually." The logical inquiry then follows—has this interest been paid? The instrument itself reveals no notation of interest payments. It contains no interest coupons which, if still attached, would indicate that interest had not been paid and would enable a prospective purchaser to calculate quickly what the note called for. But the difficulties of one taking the instrument do not stop there. Assuming that someone furnishes information to the effect that some, or all, of the five interest payments have been paid, a person about to acquire the instrument still cannot tell what sum is to be paid at maturity of the instrument. He must inquire as to the exact date on which each interest payment was paid. For, if any payments of interest were "deferred," those deferred payments bear interest at ten per cent. From what date? Here another serious ambiguity exists, as each note contains the provision "Deferred interest payments to bear interest from maturity at 10% per annum, payable semi-annually."

"Maturity" when applied to commercial paper means the time when the principal sum of a bill or note becomes due and demandable.

Ardmore State Bank v. *Lee,* 61 Okla. 169, 159; Pac. 903 (1916);

Seabury v. *Sibley,* 183 Mass. 105, 66 N. E. 603 (1903);

2 *Bouvier's Law Dictionary* (3rd Edition), p. 2122.

In *First National Bank of Miami* v. *Bosler, supra,* in which the provision under consideration was "Deferred payments are to bear interest from maturity at ten per cent. per annum semi-annually," it is evident that the Court considered the term "maturity" as meaning the time when the principal was due. But the Petitioner contends that this ordinary, accepted meaning of the term "maturity" is not to prevail in the instant case. In the case under consideration, it is urged that "maturity" refers not to the principal debt, but to the due date of the interest payments themselves. Clearly, a real ambiguity exists here. Exactly what was meant by the use of the term "maturity" and what was contemplated by the provision? Petitioner contends it was surely the intent of the parties that, as each interest payment was not made, interest at the increased rate was to run on the small amount of unpaid interest and continue to run until paid. Is it not equally as reasonable to suppose that the maker intended to allow all unpaid interest to accrue without penalty until maturity of principal, at which time unpaid interest would be lumped together and bear interest at the increased rate from the date of the maturity of principal.

Obviously, there are two possible constructions, each logical and warranted by the language of the instrument. The note does not definitely indicate which is the true construction, and, being capable of both, cannot be said to be certain.

In *Acme Coal Co.* v. *Northrup National Bank of Iola, Kan.,* 23 Wyo. 66, 146 Pac. 593 (1915), relied

upon by Petitioner, the question was not similar to the one here presented. In that case, the statute provided that where printed and written provisions of the instrument conflicted, the written provision should prevail. Accordingly, there was no ambiguity there—the written provision was the only applicable provision. If the statute had been silent as to which provision should prevail, it would hardly be contended that the instrument in *Acme Coal Co.* v. *Northrup National Bank, etc.,* containing as it did two conflicting rates of interest possessed the certainty required by general commercial law. No statutory assistance appears to indicate the true meaning of the provision as to maturity in the instant case, consequently it is the contention of Respondent that the resulting uncertainty deprives the instrument of negotiability.

The Pennsylvania court, in the Bosler case, *supra,* and the New Jersey court in *New Miami Shores Corporation* v. *Duggan, supra,* in ruling as they did, were merely reasserting a settled principle of construction that the negotiability of a written instrument is to be determined by what appears upon the face of the paper, unaided by outside proof. *Gazlay* v. *Riegel,* 16 Super. (Pa.) 501 (1901); *Overton* v. *Tyler,* 3 Pa. 347 (1846); *Davis* v. *Brady,* 17 S. D. 511 (1903); *Story* v. *Lamb,* 52 Mich. 525 (1884); *Waterhouse* v. *Chouinard,* 128 Me. 505, 149 Atl. 21 (1930). As stated in Williston, Negotiable Instruments (1931), p. 37:

> "It is a cardinal principle that the negotiability of an instrument must be capable of determination from its face and not be dependent on extrinsic circumstances."

Under the principles established by the law merchant, negotiable instruments were to be for a sum certain, in order that they fulfill their proper functions as media of exchange and pass freely and unrestrictedly among business men and commercial houses. The classic simile used by Gibson, *J.*, in Overton *v.* Taylor, 3 Pa. 347 (1846), when he declared that the negotiable instrument was a "courier without luggage," accurately describes the original idea of such instruments. Courts with a view towards preserving this original idea have repeatedly frowned on the addition of clauses and provisions which would impede the passage of this "courier," recognizing that if the instrument contains novel or ambiguous provisions, persons to whom it is tendered in commercial transactions will be inclined to be wary and refuse to accept it. Inasmuch as the provisions under consideration have such effect, it is respectfully submitted that it is not the sort of negotiable instrument contemplated by the law merchant and should not be sustained as a negotiable instrument under the general commercial law.

The decision of the Circuit Court, in line with that of Pennsylvania in *First National Bank of Miami* v. *Bosler, supra,* and *New Miami Shores* v. *Duggan, supra,* indicates an adherence to sound principles of commercial law, and, it is therefore submitted, should not be disturbed.

CONCLUSION.

It has been shown that the Circuit Court, in its decision, merely followed well recognized principles and acted in accord with the decisions and expressions of this Court and the decisions of other lower Federal Courts in applying the general commercial law in order to determine the negotiability of the notes under consideration. It has been further shown that, in deciding as it did, the Circuit Court committed no error and, even though error was committed, such error was harmless, as the law of the forum applicable to the procedural point involved is in accord with that found by the Circuit Court to be the general commercial law. Even though it be assumed that Florida law should control, no adjudication by the highest Florida Court appears to have passed upon notes with provisions identical to those involved in the instant case.

It has been further shown that the Circuit Court correctly applied general principles of commercial law in ruling the notes in question non-negotiable because of uncertainty and that, by so acting, the Circuit Court violated no provision of the Federal Constitution. On the contrary, the action of the Circuit Court was required by the Constitution, the Acts of Congress and the decisions of this Court and the lower Federal Courts interpreting the Constitution and laws thereunder.

For the foregoing reasons, it is the contention of Respondent that the decision of the Circuit Court should be affirmed.

Respectfully submitted,

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